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Supreme Court, U.S.
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No. 94-304

In The

Supreme Court of the United States

October Term, 1994

THE VILLAGE OF OCONOMOWOC LAKE,

Petitioner,

v.

DAYTON HUDSON CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS CITY OF OCONOMOWOC AND TARGET STORES, A DIVISION OF DAYTON HUDSON CORPORATION IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioner has improperly framed the issue on review based upon dicta contained in the Seventh Circuit Court of Appeals' decision that discharges to groundwater are not covered by the Clean Water Act. The question presented for review actually concerns whether this Court has jurisdiction where Petitioner failed to comply with the 60-day notice requirements contained in the Clean Water Act, 33 U.S.C. § 1365. Accordingly, the question presented for review is as follows:

> Does a federal court have subject matter jurisdiction pursuant to the Clean Water Act over a citizen suit action when the complainant fails to provide adequate notice pursuant to 33 U.S.C. § 1365(b)?

LIST OF PARTIES

Respondents, City of Oconomowoc and Target Stores, a division of Dayton Hudson Corporation,[1] object to Petitioner's "Statement Naming Additional Parties." Supreme Court Rule 24.1(b) requires Petitioner to include "[a] list of all parties to the proceeding in the court whose judgment is sought to be reviewed, unless the caption of the case in this Court contains the name of all parties."

In the guise of complying with Supreme Court Rule 24.1(b), Petitioner has referenced and included a proposed *amicus curiae* brief written by the United States Environmental Protection Agency ("EPA") which is not part of the record on review. As acknowledged by Petitioner in its "Statement Naming Additional Parties," the referenced brief was refused by the Seventh Circuit Court of Appeals and was not filed in this proceeding. (Petition ii)[2]

It is a well-established principle of Supreme Court procedure that attempts should not be made to submit additional or different evidence that is not part of the record on review. *Russell v. Southard*, 12 How. 139, 158,

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[1] Dayton Hudson Corporation is a publicly held corporation engaged in the retailing of merchandise. Dayton Hudson Corporation operates the following retail stores throughout the United States: Target, Marshall Fields, Dayton's, Mervyn's and Hudsons. This information is being submitted pursuant to Supreme Court Rule 29.1.

[2] References to Petitioner's Writ of Certiorari are designated as (Petition ___).

LIST OF PARTIES – Continued

159 (1851); *Hopt v. Utah*, 114 U.S. 488, 491-92 (1885); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58 n. 16 (1970). Indeed, the American Bar Association has gone so far as to label such efforts "unprofessional conduct." The Prosecutor Function Standard 3-5.9; The Defense Function Standard 4-7.9 (2d ed. 1979).

Apart from Petitioner's unwarranted and wholly improper reference to the proposed *amicus curiae* brief of the EPA, Respondents agree with Petitioner's "Statement Naming Additional Parties."

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STATUTES INVOLVED

33 U.S.C. § 1365

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced –

(1) under subsection (a)(1) of this section –

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the

> **Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or**
>
> **(B)** if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
>
> (2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. (emphasis added)

STATEMENT OF THE CASE

Procedural History

This case is one of twenty (20) legal proceedings initiated by the Village of Oconomowoc Lake ("the Village") and others to stop the development of the Target Midwest Regional Distribution Center ("Target Center") in an industrial park in the City of Oconomowoc, Wisconsin. (R.1, 29) This action was filed on July 30, 1993 after the Village had been unsuccessful in obtaining relief from several Wisconsin state administrative agencies, county

circuit courts, the Wisconsin Court of Appeals and the Wisconsin Supreme Court. (R.29)

The Complaint originally named Dayton Hudson Corporation, the Wisconsin Department of Natural Resources ("DNR") and its Secretary, and the United States Environmental Protection Agency ("EPA") its Administrator and Regional Administrator as defendants. (R.1) The City of Oconomowoc ("City") was allowed to intervene as a defendant by the district court because the Target Center will create 700 jobs and generate $800,000 in annual tax revenue for the City when fully operational. (R.25, 30:398) On August 26, 1993, the Village voluntarily dismissed all of the federal defendants. (R.36)

The Complaint alleged that the DNR improperly applied Wisconsin law when it issued Target an indirect source air permit and when it authorized Target to discharge stormwater runoff to the groundwater underlying the facility. (R.1.) The Village alleged that these decisions of the DNR gave rise to claims under the federal Clean Air Act and Clean Water Act. *Id.* The district court disagreed. (R.56; Pet. A. 20a)[3]

On August 11, 1993, the district court, like numerous state courts before it,[4] denied the Village's motion for

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[3] References to the Appendix of Petitioner's Writ of Certiorari are designated as (Pet. A. ___). References to the Appendix of Respondents' Brief in Opposition are designated as (Resp. A. ___). References to the Record are designated as (R.___).

[4] The Petitioner has requested injunctive relief from various tribunals at least 17 times. Each request for injunctive relief has been rejected. See, Joint Memorandum of the City of Oconomowoc and Target Stores Opposing Motion for Injunctive

temporary injunctive relief. (R.13, 34) Subsequently, on September 24, 1993, the district court granted motions to dismiss for lack of federal subject matter jurisdiction. (R.56; Pet. A. 13a) In reaching its decision, the district court concluded that indirect sources of air emissions, such as parking lots, are not required to obtain a permit under Part D of the Clean Air Act and that stormwater discharges to groundwater are not subject to regulation under the Clean Water Act. *Id.*

The Village appealed to the United States Court of Appeals for the Seventh Circuit. (R.58) On February 15, 1994, the day of oral argument before the Seventh Circuit Court of Appeals, the EPA attempted to re-enter the case as an *amicus*. (Pet. A. 23a) The primary reason given for the EPA's eleventh hour appearance was that the EPA could not state its position on regulation of groundwater discharges until the Clinton Administration had finalized its position on Congressional Clean Water Act initiatives and the Administration had not done so until February 1, 1994. (Pet. A. 26a) The Seventh Circuit Court of Appeals refused to accept or file the EPA's *amicus curiae* brief. (Pet. A. 22a)

On May 18, 1994, the United States Court of Appeals for the Seventh Circuit entered its decision affirming the district court. (Pet. A. 11a)

Relief Pending Appeal filed with the Seventh Circuit Court of Appeals.

The Development of the Target Facility

The Target Center occupies 25 acres of a 99-acre site and provides state-of-the-art warehousing and distribution services for 37 Target stores in Wisconsin, Illinois and Iowa. (R.30:422) The facility was built at a cost of $63 million and is now complete. (Resp. A. 11)

The Industrial Park District in which the Target Center is located was originally developed in 1989 based upon the reports and recommendations of the Southeast Wisconsin Regional Planning Commission ("SEWRPC"). (R.30:398) The site is located off State Highway 67, a four-lane highway, approximately one-quarter of a mile from Interstate Highway I-94, a heavily traveled major artery for the City of Milwaukee. (R.30:398) The Target Center is immediately adjacent to the existing Oconomowoc Corporate Center which contains several factories. (R.30:398)

Before construction of the facility commenced, Target obtained all necessary state and local permits and approvals. (Pet. A. 1a; R.30:422) These included a Conditional Use Permit from the City Plan Commission,[5] building permits from the city and state, an "indirect source" air permit for the parking lot from the Wisconsin Department of Natural Resources,[6] and a stormwater discharge authorization from the DNR. (R.30:422)

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[5] The Plan Commission approval was granted after a public hearing and two Plan Commission meetings. The review included traffic impacts, water quality impacts, geotechnical evaluations, building code reviews and documents submitted to the DNR for its permits. (R.30:426.)

[6] As part of the review of the air permit, the DNR prepared an extensive Environmental Assessment ("EA") under the Wisconsin Environmental Policy Act. (R.30:444-485) After review of

Target submitted a "Notice of Intent for Stormwater Discharges Associated With Construction Activities" to the DNR on April 9, 1993 because of the potential for discharges to groundwater. (R.30:498) Under state law, Wisconsin voluntarily chose to regulate the discharge of pollutants to groundwater resources. Wis. Stat. § 147.015(20) Significantly, no surface water discharges were at issue. (R.30:533)

The Notice of Intent included a detailed stormwater management report describing the stormwater management techniques which would be utilized during the construction of the distribution center. (R.30:499) This report also included detailed plans for a state-of-the-art stormwater retention and infiltration pond which would collect and treat stormwater runoff from the parking areas once the facility was completed. (R.30:528) On April 22, 1993, the DNR issued a letter to Target's general contractor expressly authorizing the stormwater discharges associated with the construction activities described in Target's Notice of Intent. (R.30:539)[7]

Target did not need to apply for a stormwater discharge permit for its operations until 180 days prior to the commencement of facility operations. Wis. Stat. § 147.025(2); (R.30:499) Subsequently, on February 11,

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written public comments and comments at public hearings held on April 8 and 12, 1993, the DNR concluded that the facility did not have a significant impact on the quality of the human environment and that therefore a full Environmental Impact Statement was not required. *Id.*

[7] The Construction Site Stormwater Discharge Authorization is attached to the Schueller Affidavit. (R.30:539)

1994, the DNR confirmed that Target did not require a stormwater discharge permit for operation of the facility once constructed. (Resp. A. 5) Once the facility was constructed and became operational, the DNR again confirmed that the Distribution Center was not required to obtain a discharge permit.[8] (Resp. A. 9)

SUMMARY OF THE ARGUMENT

This case does not warrant review by this Court for several reasons. First, the Village failed to provide adequate and timely notice under the citizen suit provisions of the Clean Water Act and Clean Air Act. Accordingly, this Court lacks subject matter jurisdiction to issue the requested writ of certiorari.

Second, the issues presented for review regarding the stormwater discharges from construction and operation

[8] On September 15, 1994, Attorney Charles R. Hammer of the DNR Bureau of Legal Services issued a letter opining that the Target Center was not required to obtain any permit whatsoever for the stormwater runoff discharges associated with operation of the facility. (Resp. A. 9) Although this letter is not part of the formal record on review, it can be considered by this Court as it is a fact with respect to the mootness of the Village's requested writ of certiorari. *Board of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (It is appropriate to remind counsel that they have a "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation.); citing, *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975). As discussed fully in section II of this brief, the DNR's determination that its final rules do not require the Target Center to obtain a stormwater discharge permit makes the Petition for a Writ of Certiorari moot.

activities at the Target Center are now moot. With regard to construction activities, all construction has been completed on the Target Center. With regard to ongoing stormwater discharges associated with operational activities at the Target Center, it has been determined and confirmed by the DNR that the Target Center is not required to obtain any permit whatsoever regulating its discharge of stormwater.

Third, the issue presented for review has not been properly raised by the record. The issue which the Village has presented is based entirely upon dicta contained in the Seventh Circuit Court of Appeals' decision. Furthermore, the Village has wholly failed to make a good faith allegation regarding the discharge of pollutants to waters of the United States (i.e. surface water). Indeed, its own expert testified that the stormwater runoff is not expected to impact the surrounding surface waters. (R.49)

Finally, review by this Court is not warranted at this time because the issue presented for review has not been fully developed by the lower courts nor has it been resolved by EPA or Congress.

ARGUMENT

I. THIS CASE DOES NOT WARRANT REVIEW BECAUSE THERE IS NO SUBJECT MATTER JURISDICTION OVER THE VILLAGE'S CLEAN WATER ACT CLAIMS.

A. Compliance With The 60-Day Notice Requirement Is A Mandatory Jurisdictional Prerequisite To Citizen Suit Actions Under The Clean Water Act.

The Village asserted jurisdiction in the district court under the citizen's suit provisions of the Clean Water Act. 33 U.S.C. § 1365(a). However, a mandatory prerequisite of such an action is that a complainant give 60 days notice prior to filing its lawsuit. 33 U.S.C. § 1365(b); see, *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989), citing *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987).

The 60-day notice requirement, which is common to citizen suit provisions under the Clean Water Act (33 U.S.C. § 1365), the Clean Air Act (42 U.S.C. § 7604) and the Resource Conservation and Recovery Act (42 U.S.C. § 6972), serves two functions:

> First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. . . . Second, notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.

Hallstrom, 493 U.S. at 29, citing *Gwaltney of Smithfield*, 484 U.S. at 60.

This Court has repeatedly emphasized the importance of complying with this jurisdictional prerequisite. In *Hallstrom*, which involved an analogous notice provision under the Resource Conservation and Recovery Act (42 U.S.C. § 6972(c)), this Court held that 60-day notice requirements are "mandatory conditions precedent to commencing suit under the RCRA citizen suit provision." 493 U.S. at 29.

This Court's holding in *Hallstrom* interpreting the Resource Conservation and Recovery Act citizen suit provisions has been applied to Clean Water Act citizen suit claims. *National Envtl. Found. v. ABC Rail Corp.*, 926 F.2d 1096, 1097 (11th Cir. 1991) (holding that "the 60-day notice requirement of 33 U.S.C. § 1365(b) is a mandatory condition precedent to the filing of a citizen suit under the Clean Water Act."); *Citizens for Better Environment-California v. Union Oil Co. of California, et al.*, ___ F. Supp. ___ 1994 WL 475591 (N.D. Cal. 1994).

Due to the importance of the notice requirements of citizen suit provisions, courts have held that failure to provide proper notice will result in dismissal of the entire citizen suit for lack of subject matter jurisdiction. *Massachusetts v. United States Veterans Admin.*, 541 F.2d 119, 121 (1st Cir. 1976); *Protect Our Eagles' Trees v. Lawrence*, 715 F. Supp. 996, 998 (D. Kan. 1989); *Citizens For A Better Environment-California*, WL 475591; *Tannenbaum v. Jamison*, ___ F. Supp. ___, 1994 WL 247120 (N.D. Ill. 1994); *United States v. Princeton Gamma-Tech, Inc., et al.*, ___ F.3d ___, 1994 WL 394696 (3rd Cir. 1994); *Portsmouth Redevelopment and Housing Authority v. BMI Apartments Assoc.*, 847 F. Supp. 380, 386 (E.D. Va. 1994); *City of Highland Park v. Train*, 519 F.2d 681, 691 (7th Cir. 1975), *cert. denied*, 424 U.S. 927

(1976). Because the notice requirement is deemed to be jurisdictional in nature, the Village's utter failure to meet this requirement deprives this Court of jurisdiction to issue the writ of certiorari. This Court will not grant review where jurisdiction is not present. *Gotthilf v. Sills*, 375 U.S. 79, 80 (1963); *Gorman v. Washington University*, 316 U.S. 98, 100 (1942).

B. The Village Failed To Comply With The 60-Day Notice Requirement.

Here, the Village admits it failed to give a 60-day notice. (Petition 7) Moreover, the Village does not attempt to claim that its action was brought under 33 U.S.C. §§ 1316 or 1317(a), which are exempt from the notice requirement. Instead, the Village argues that it was not required to comply with the 60-day notice requirement under the Clean Water Act because it also alleged Clean Air Act claims which did not require advance notice. *Id.* Specifically, the Village alleges because "the suit was, in part, premised upon 42 U.S.C. § 7604(a)(3)" of the Clean Air Act, it did not have to comply with the 60-day notice under 33 U.S.C. § 1365. *Id.*

Even if one were to accept the hybrid jurisdiction "premise" the Village asserts under *Dague v. City of Burlington*, 935 F.2d 1343, 1351 (2nd Cir. 1991), rev'd in part on other grounds, ___ U.S. ___, 112 S. Ct. 2638 (1992), there is a fundamental flaw in the Village's argument.[9]

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[9] The hybrid jurisdiction argument is based entirely on two cases *Dague* and *Zands v. Nelson*, 779 F. Supp. 1254, 1260-61 (S.D. Cal. 1991) which relies on *Dague*. Both cases present citizen suit

The Court of Appeals in this case held that Clean Air Act jurisdiction under 42 U.S.C. § 7604(a)(3) was "impossible":

> But to use § 7604(a)(3) the Village had to show that 'part D of subchapter I of this Chapter' requires a major-facility permit, *and it is impossible to see how this could be so.* . . . '[P]art D of subchapter I' does not require Dayton Hudson to obtain a permit; any such requirement must come from Wisconsin law and therefore *cannot* serve as a foundation for suit under § 7604(a)(3).' (emphasis added)

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 964 (7th Cir. 1994). (Pet. A. 4a). The Village has not petitioned for review of this aspect of the Seventh Circuit Court of Appeals' decision. (Petition i)

In the absence of a valid Clean Air Act claim under 42 U.S.C. § 7604(a)(3), there is no basis for excusing compliance with the 60-day notice requirement under the Clean Water Act. Nor should there be. If a party could avoid the 60-day notice requirement simply by making a groundless or "impossible" allegation that some exception applies, then the 60-day notice requirement would be effectively removed from the statutes of all major environmental laws.

Even the Court in *Dague* acknowledged that dismissal of a claim requiring 60 days notice is appropriate

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claims under the Resource Conservation and Recovery Act. There are no reported cases which apply this theory to hybrid claims under the Clean Air Act and Clean Water Act.

in the absence of a valid underlying claim which is not subject to an advance notice requirement:

> It [the City] also argues that if plaintiffs could circumvent the delay requirements by simply asserting a subchapter III claim, whether or not such a claim has merit, the congressional policy for delay would be effectively nullified.
>
> * * *
>
> Of course, if a plaintiff should allege frivolous subchapter III claims, he would not only be subject to Rule 11 sanctions, but his claims could also be dismissed early in the litigation process, and *the court, by stay or dismissal, could require full observances of the delay period.* (Emphasis added).

Dague, 935 F.2d at 1351-52.

Here, although not subject to Rule 11, the Seventh Circuit Court of Appeals has dismissed the Village's wholly meritless Clean Air Act claims. There is no independent basis for federal jurisdiction or to allow the Clean Water Act claims asserted in this action to proceed in the absence of a proper 60-day notice. In the absence of subject matter jurisdiction, this court has no basis to accept the petition. *Gotthilf*, 375 U.S. at 80; *Gorman*, 316 U.S. at 100.

II. THIS CASE DOES NOT WARRANT REVIEW BECAUSE THE ISSUES ARE MOOT.

Under the 1987 Amendments to the Clean Water Act, stormwater discharges "associated with industrial activities" are subject to the discharge permit program. 33

U.S.C. § 1342(p). Industrial activities are defined by reference to the Standard Industrial Classification (SIC) Code published by the Office of Management and Budget. 40 C.F.R. § 122.26(a)(1)(ii) and (b)(14). Construction sites affecting areas greater than 5 acres are included as an industrial activity even if the facility when completed is not considered an industrial activity. *Id.*

The Village alleges that Target needed a water discharge permit for two types of stormwater discharges to groundwater. Specifically, the Village alleges Target needed a discharge permit for stormwater discharges associated with the construction of the Target Center and another permit for discharges associated with operation of the Target Center. Both of these issues are now moot.

A. Issues Associated With Stormwater Discharges From Construction Are Moot Because Construction Is Completed.

Construction of the Target facility began on June 6, 1994 and has now been completed. (Resp. A. 11)[10] Thus, even if stormwater discharges from construction activities were covered by the Clean Water Act, there are no continuing stormwater discharges from construction activities at the Target Center. It is a well established principle that a Clean Water Act citizen suit action cannot

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[10] The Beglin Affidavit is not part of the record on review. However, because the completion of the Target Center gives rise to the issue of mootness, it is proper for this Court to consider such factual evidence. *Board of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985); citing, *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975).

be brought for "past violations." *Gwaltney of Smithfield*, 484 U.S. at 64. Accordingly, this issue is moot.

While the claim is moot, it should be noted that Target fully complied with the DNR's requirements for control of stormwater discharges from construction sites.[11] In accordance with the Wisconsin stormwater program, Target submitted to the DNR a Notice of Intent to Discharge Stormwater ("NOI") along with a detailed construction site erosion plan on or about April 9, 1993. (R.30:518) On April 28, 1993, Target's general contractor, Witcher Construction Company, received notice from the DNR that stormwater was authorized to be discharged from the Target Center construction site. (R.30:539)

B. Issues Associated With Stormwater Discharges From Operational Activities Are Moot Under DNR Rules.

Under the Clean Water Act, states are required to develop and implement their own discharge permitting programs. 33 U.S.C. § 1342(b). Once a state's program is approved by EPA, that state is delegated **sole** authority to authorize discharges. *Id.* Wisconsin has been delegated authority by the EPA to implement and enforce its own discharge permit program pursuant to 33 U.S.C. § 1342.

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[11] Although under no federal requirement to do so, the State of Wisconsin voluntarily chose to regulate and permit the discharge of stormwater runoff to groundwater resources. Indeed, Wisconsin requires permits for the "discharge of any pollutant into *waters of the state.*" Wis. Stat. § 147.02(1) (emphasis added). The term "waters of the state" is defined to include both "surface water" and "groundwater." Wis. Stat. § 147.015(20).

(R.30:497; Resp. A. 14) That delegation has been neither suspended nor revoked by the EPA. *Id.*

In accordance with this delegation, the DNR began to develop formal administrative rules to implement the storm water permit program.[12] These rules, now contained in Wis. Admin. Code ch. NR 216, were adopted by the Wisconsin Natural Resources Board at its June 1994 Board meeting, have completed legislative review and are now final. (Resp. A. 10)

In accordance with federal mandates, NR 216 only regulates stormwater discharges from facilities with specific SIC codes. 40 C.F.R. § 122.26(a)(1)(ii) and (b)(14); Wis. Admin. Code § NR 216.21. The Target Center is classified as SIC Code 5311 (Resp. A. 3) which does not require a permit under the DNR's final rules. See, Wis. Admin. Code § NR 216.21. This was confirmed by the DNR in a letter dated February 11, 1994 from DNR Staff Attorney Charles Hammer while the rules were in draft form. (Resp. A. 5) Attorney Hammer issued a subsequent opinion after NR 216 was finalized which confirmed that the Target Center, being classified as SIC Code 5311, was not

---

[12] Prior to the finalization of those rules, the DNR administered the program informally. (R.30:497; Resp. A. 16) The DNR required that any person who anticipated commencing a discharge submit a Notice of Intent ("NOI"). *Id.* Upon receiving the NOI, the DNR determined whether the applicants discharging activities were authorized. *Id.* The DNR then sent a letter confirming receipt of the NOI application and authorizing stormwater to be discharged. *Id.* Target, along with over 4,000 other entities in Wisconsin have followed this process and have received authorization to discharge stormwater from their respective construction sites. *Id.*

required to obtain any stormwater discharge permit for its facility. (Resp. A. 9) Thus, even if stormwater discharges to groundwater were covered under the Clean Water Act, Target does not require a permit. Since a remand would accomplish nothing, this issue is moot.

The Village's real complaint appears to be that the stormwater permit program was improperly delegated to Wisconsin or is being improperly administered. Under the terms of the Clean Water Act, the Village's recourse for alleged deficiencies in Wisconsin's delegated stormwater program is to seek to have the EPA Administrator withdraw Wisconsin's stormwater authorization or challenge the recently promulgated rules. 33 U.S.C. § 1342(c)(3). The Village has not sought this remedy. Indeed, although the Village named EPA in its original Complaint, the Village voluntarily dismissed EPA on August 26, 1993. (R.36)

III. THE ISSUE PRESENTED FOR REVIEW IS NOT PROPERLY RAISED BY THIS RECORD.

A. The Issue Presented For Review By The Village Is Dicta.

As discussed in section I of this brief, the Village failed to comply with the mandatory jurisdictional 60-day notice requirement of the Clean Water Act. In an effort to evade the 60-day notice requirement, the Village invoked 42 U.S.C. § 7604(a)(3) which is not subject to an advance notice requirement.

It was the Village's failure to meet the 60-day notice requirement that resulted in the Seventh Circuit's affirming the dismissal of their complaint. See, *Village of Oconomowoc Lake*, 24 F.2d at 963. Indeed, the Seventh Circuit severely criticized the Village's attempts to avoid the 60-day notice requirement and wrote:

> Why plaintiffs are unwilling to wait even 60 days – when an effort to jump the queue may lead to outright dismissal of the case under *Hallstrom* – eludes us. The Village filed suit only three days after giving notice. To justify this expedition, it invoked 42 U.S.C. § 7604(a)(3), which is not subject to the 60-day rule. Although this enabled it to sue 57 days sooner than it could have done had it used § 7604(a)(1) as the foundation of the suit, the strategy does little besides illustrate the adage that haste makes waste. (This saying predates the Clean Air Act and shows that not all waste is within federal jurisdiction.)

Id.

The Village ignores this portion of the Seventh Circuit opinion and instead attempts to fashion an issue based upon the Seventh Circuit's dicta concerning regulation of groundwater discharges under the Clean Water Act. However, the Seventh Circuit's decision affirming dismissal stands on its own without need to consider whether groundwater discharges are subject to regulation under the Clean Water Act.

Accordingly, the portion of the Seventh Circuit opinion addressing groundwater is mere dicta and is not appropriate for review by this Court. See, *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959); *Belcher v. Stengel*,

429 U.S. 118 (1976) (A writ of certiorari is not necessary if the judgment below was clearly correct on another ground.); *Smith v. Butler*, 366 U.S. 161 (1961) ("After full argument and due consideration, it became manifest that the course of litigation and the decisions in the [other] courts did not turn on the issue on the basis of which certiorari was granted"); *Newsom v. Smyth*, 365 U.S 604, 604-605 (1961) (Certiorari is not proper if it may become evident that "the record does not adequately establish that the [court below] found or was required to find that there was presented to it the federal claim on which the case was brought [to the Court].")

Notwithstanding the Village's attempt to characterize the question presented for review as whether Clean Water Act jurisdiction extends to groundwater discharges, that aspect of the Seventh Circuit's decision was dicta. The basis of the Seventh Circuit opinion was simple. The Village failed to meet the express 60-day notice requirement.

B. The Village Has Not Made A Good Faith Allegation Regarding The Discharge Of Pollutants To Waters of the United States.

When a defendant claims that jurisdiction is not present, the obligation is on the plaintiff to demonstrate to the court through actual proof that jurisdiction is present. *Western Transp. Co. v. Couzens Warehouse & Distributors, Inc.*, 695 F.2d 1033, 1038 (7th Cir. 1982); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989). Furthermore, the plaintiff's allegation of jurisdiction must be made in good faith. *Gwaltney*, 484

U.S. at 64; *Public Interest Research Group, Inc. v. ELF Atochem North America, Inc.*, 817 F. Supp. 1164, 1174 (D.N.J. 1993). Here, the record before the district court unequivocally demonstrates that the Village's allegations have not been made in good faith.

The Clean Water Act only regulates the discharge of pollutants to the waters of the United States (i.e., surface waters). 33 U.S.C. § 1311(a). Even if this Court were to accept the Village's novel argument that the Clean Water Act can regulate discharges to groundwater if it is hydrologically connected to surface water, the Village must still make a good faith allegation that the Target Center will discharge pollutants in such a manner. It has not done so.

The Village made a general allegation that stormwater discharges associated with the Target Center contain pollutants that will be "expressed and discharged" into waters of the United States. However, those allegations are wholly unsubstantiated and have been expressly refuted by the Village's own expert.

Supplement No. 1 to the Storm Water Management Report submitted by Target to the DNR indicated that stormwater runoff from the facility "will be treated, as needed, **to remove contaminants** and then infiltrated to recharge the groundwater." (R.30:533) (emphasis added) As stated, the retention pond is designed to remove contaminants and pollutants prior to the water being discharged from the site. Since pollutants will be removed, pollutants will not be conveyed by groundwater into waters of the United States as alleged in the Complaint.

Even more compelling is the Village's own expert, Dr. Frank Jones, who testified that the Village's allegation

suggesting that pollutants will be "expressed and discharged" into waters of the United States is just not true. Indeed, Dr. Jones admitted at his deposition on September 7, 1993, that no discharges will occur to surface water:

Q I invite your attention to Exhibit 45, Dr. Jones. Is that a document that you authored as evidenced by your name at the top of the document?

A Yes, it is.

Q And what was the purpose of authoring the document?

A It was to provide an information summary sheet on some of the items that I had investigated or had investigated by others, or had investigated by other individuals within Geraghty & Miller.

Q Was one of the purposes to do a presentation at a town meeting of the Town of Summit which took place on August 11th, 1993?

A Well, this was prepared before that, but I did present it at the town meeting on August 11th.

Q Why did you appear at a town meeting on August the 11th?

A I was requested to.

Q On Page 2 of Exhibit 45 you state, "Even if the groundwater is impacted **it is not expected that the contaminants in the groundwater will impact the surrounding lakes and rivers because the primary contaminants of concern would be held to the soils or diluted before reaching the surface waters,"** is that your opinion?

A Yes.

Jones Dep. Tr. 163-64 (emphasis added) (R.49)

Thus, even if discharges to groundwater hydrologically connected to surface water are covered by the Clean Water Act, the Village's Complaint should still be dismissed. The record clearly indicates that there will be no direct or indirect discharge of pollutants into waters of the United States. Indeed, the Village's own expert has already testified that the Village's allegations to the contrary are just not true. Accordingly, the issue presented for review is not properly raised by this record.

Finally, because the case was dismissed before a complete factual record could be developed, there was no opportunity for the Respondents to introduce evidence to the district court concerning the effects of expanded federal Clean Water Act jurisdiction. If any point source discharge to groundwater hydrologically connected to surface water was covered by the Clean Water Act, nearly every septic tank, sprinkler system and drainage ditch would require a permit. Problems associated with such a judicial expansion of the Clean Water Act were raised by the Seventh Circuit in the concurring opinion and are currently being debated by Congress. See, *Village of Oconomowoc Lake*, 24 F.3d at 966. (Pet. A. 10a)

IV. REVIEW BY THIS COURT IS NOT WARRANTED AT THIS TIME.

A. The Issue Presented for Review Has Not Been Fully Developed By The Lower Courts.

The Village claims that the Seventh Circuit Court of Appeals' decision in this case is in conflict with "better reasoned authorities." (Petition 15) In fact, only three

reported cases have directly addressed the issue presented. In *Kelley v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985), the court concluded that "the unmistakably clear legislative history . . . demonstrate that Congress did not intend the Clean Water Act to extend federal regulatory and enforcement authority on groundwater contamination." The district court and Seventh Circuit Court of Appeals in this case both relied on *Kelley*.

The district court in *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (D. Colo. 1993) reached a contrary result, however, that case is now on appeal. (Pet. A. 83a) Finally, in *McClellan Ecological Seepage Situation (MESS) v. Cheney*, 763 F. Supp. 431 (E.D. Cal. 1989), the court, on remand, allowed plaintiffs to submit proof on whether groundwater was hydrologically connected to surface water and whether there was a discharge of pollutants. That case however involved alleged seepage from hazardous waste disposal pits to a nearby surface water.

Other cases, to the extent they have addressed the issue at all, tend to support the Seventh Circuit Court of Appeals' opinion in this case. In *Exxon Corp. v. Train*, 554 F.2d 1310, 1329 (5th Cir. 1977), the Fifth Circuit reviewed the Clean Water Act legislative history and concluded in the context of isolated groundwater that, "As we read these materials, the House, like the Senate, through the bill would leave control of groundwater pollution exclusively to the states."

In *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1422-23 (7th Cir. 1990), the Seventh Circuit concluded that a discharge through an injection well "might be within the scope of the Act" but reserved judgment. The Seventh Circuit has

now addressed the issue by the opinion in this case. Moreover, the discharges addressed in *Inland Steel* were discharges through injection wells which, unlike storm-water infiltration, are expressly regulated under the Clean Water Act. See, 33 U.S.C. § 1342(b)(1)(D).

Thus, this is hardly a situation where the lower courts have developed the law and defined a conflict warranting the attention of this Court. This Court has frequently noted that a conflict should be allowed to ripen before being given consideration. In *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950), Justice Frankfurter noted:

> It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

The time for adjudication of this issue has not yet come.

B. The Issue Presented Has Not Been Resolved By EPA And Is Now Being Reviewed By Congress.

Although the Village would have the Court believe that EPA has had a clearly articulated longstanding position supporting the regulation of groundwater, that is simply not true. In fact, EPA's position in this case could not even be articulated to the Seventh Circuit Court of Appeals until February 15, 1994 because the Clinton Administration's position on the Clean Water Act reauthorization was not known until February 1, 1994.[13] (Pet. A. 26a).

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[13] This uncertainty is reflected in the fact that EPA and other federal agencies have often taken positions contrary to the

Whether the Clean Water Act should be changed to include groundwater within its scope is one of the issues involved in the Clean Water Act reauthorization debate in Congress. The 1994 Clean Water Act "rewrite bill," HR 3948, would specifically amend the Clean Water Act to include certain discharges to groundwater. Section 404 of the bill provides:

> Sec. 404. DISCHARGES INTO GROUND WATER.
>
> Section 402 (33 U.S.C. 1342) is amended by adding at the end the following:
>
> '(r) Discharges into Ground Water.-
>
> '(1) General Rule.-For the purposes of this section, any discharge of a pollutant into the ground or ground waters shall be treated as a discharge of a pollutant into the navigable waters if-
>
> '(A) There is a reasonably foreseeable and demonstrable direct hydrologic connection between the ground waters and surface waters in the proximity of the discharge;
>
> '(B) A greater than de minimis quantity of the pollutant reasonably and demonstrably is able to reach such surface waters; and

---

one now claimed by the Village. For example, in *Inland Steel Co.*, 901 F.2d 1419 (7th Cir. 1990), EPA took the position that the injection of wastes into wells was not governed by the Clean Water Act but rather by the Resource Conservation and Recovery Act. In *Kelley*, 618 F. Supp. at 1103 and *MESS*, 763 F. Supp. at 431, other government agencies vigorously argued that discharges to groundwater were not covered by the Clean Water Act.

> '(C) No other federal law directly addresses the activity resulting in the discharge.'

If this issue is to be revisited, it should be revisited by Congress, not by this Court.

Absent such a change, the existing language and legislative history of the Clean Water Act indicates that discharges to groundwater are not within the scope of the Clean Water Act. Several attempts were made to include discharges to groundwater in the 1972 Clean Water Act Amendments but all such attempts were directly rejected by both the House and Senate. See, *Exxon Corp.*, 554 F.2d at 1328. (The court provides a detailed review of the legislative history associated with the Clean Water Act and concludes that it is "inconceivable" that Congress intended to grant EPA authority over groundwater discharges.)

If Congress now wishes to revisit this issue, it can do so. This Court should not, however, judicially expand the Clean Water Act in the manner suggested by the Village which would extend federal jurisdiction to nearly every septic tank, parking lot and lawn sprinkler system.

CONCLUSION

Despite the Village's attempt to frame the question presented for review as involving a matter of federal importance, the simple fact is that the Village failed to meet the 60-day notice requirement of the Clean Water Act. Having failed to meet the notice requirement, this Court lacks subject matter jurisdiction over the case and

is precluded from issuing the requested writ. Furthermore, due to the Village's failure to meet the notice requirement, its petition is improperly seeking review of dicta contained in the Seventh Circuit Court of Appeals' opinion.

Even assuming that the question presented by the Village has merit, this case does not warrant review because the issues have become moot and there is no impact on surface waters presented by the facts of this case. Accordingly, the Petitioner's Writ for Certiorari must be denied.

PAUL G. KENT*
TODD E. PALMER
Counsel for City of Oconomowoc

JON P. AXELROD*
Counsel for Target Stores, a Division of Dayton Hudson Corporation

DEWITT PORTER, S.C.
Suite 600
Two East Mifflin Street
Madison, WI 53703
(608) 255-8891

*Counsel of Record

Michael Best
& Friedrich
Attorneys at Law

[Letterhead Address Omitted in Printing]

February 4, 1994

Charles R. Hammer, Esq.
Bureau of Legal Services
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Re: WPDES Storm Water Discharge Permit
Target Midwest Distribution Center
Oconomowoc, Wisconsin

Dear Mr. Hammer:

As we agreed in our recent discussions, I am writing to you to request the Department's written determination that the Target Midwest Distribution Center presently under construction at Oconomowoc, Wisconsin will not be required to apply for or obtain a Wisconsin Pollutant Discharge Elimination System ("WPDES") permit for the discharge of storm water runoff from the facility when it becomes operational. As you are aware, Target had earlier provided notice to the Department of the proposed construction activity prior to the commencement of construction.

The distribution center facility is to be used by Target Stores for the receipt and offloading of merchandise from suppliers, the storage of that merchandise and the loading and shipment of that merchandise to Target retail

stores in the region. Incorporated into the design of the facility are roof drain collection means for transporting storm water to an on-site surface impoundment. The surface impoundment also receives storm water flow from the parking lot areas of the facility following the treatment of that storm water runoff in a sand filtration mechanism. The storm water accumulated in the surface impoundment then exfiltrates to the groundwater in the area.

We understand that the regulations for the implementation of a storm water discharge permitting program in Wisconsin are presently under development. We understand also that the Wisconsin regulations will be based upon the federal storm water discharge regulations. Under the federal regulations for the permitting of storm water discharges, permits are required for facilities having a "storm water discharge associated with industrial activity" as that term is defined at 40 C.F.R. §122.26(b)(14) (1992).

Numerous categories of industries are identified in the definition of a "storm water discharge associated with industrial activity" which are required to apply for and obtain a storm water discharge permit. Facilities in industry categories having certain Standard Industrial Classification ("SIC") codes, by definition, have storm water discharges associated with industrial activity and are required to apply for and obtain a storm water discharge permit. Facilities in industry categories with certain other SIC codes are required to apply for and obtain a discharge permit only *if* the storm water discharge is from an area of the facility or activity where material handling equipment or activities, raw materials, intermediate

products, final products, waste materials, by-products, or industrial machinery are exposed to storm water. Facilities in industry categories not identified by the SIC codes are not, generally, required to obtain a storm water discharge permit.

The SIC code from the 1987 *Standard Industrial Classification Manual* applicable to the Target Midwest Distribution Center is Industry No. 5311 for "Department Stores" in Major Group 52 of Division G, Retail Trade in the SIC system. This determination is based upon the description of the retail trade division provided in the *Standard Industrial Classification Manual* (1987) at pages 313-314 which states that "[C]hain store warehouses are considered auxiliary to the retail establishment served and are classified on the basis of the activity carried on by such retail stores".

Using the promulgated federal regulations and the *Standard Industrial Classification Manual* (1987) as guides, we conclude that the requirement to apply for and obtain a storm water discharge permit is not applicable to the Target Midwest Distribution Center. The Target Midwest Distribution Center does not meet the criteria of any of the subparagraphs (i)-(xi) of 40 C.F.R. 122.26(14) (1992) as having a storm water discharge associated with industrial activity. Subparagraphs (i) and (iii) – (v) of 40 C.F.R. 122.26(a)(1) (1992) are also not applicable to the Target facility. Therefore, the Target Midwest Distribution Center should not be required to apply for and obtain a discharge permit under the WPDES program in Wisconsin for the discharge of storm water runoff at the facility.

As we agreed, you will review the information provided in this letter and provide a written determination concerning the non-applicability of the WPDES storm water discharge program to the Target Midwest Distribution Center. If you have any questions regarding the information provided, need additional information or if you wish to discuss the Department's proposed determination, please contact me as soon as possible. Thank you for your assistance in this matter.

Very truly yours,

MICHAEL, BEST & FRIEDRICH

/s/ Donald F. Kiesling
Donald F. Kiesling

DFK/mam/tar

cc: Pat Crane – Target
Dean Wenger – Target
Jeff Appelquist – Target
David Luick – Target

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES

(LOG0)
WISCONSIN
DEPT. OF NATURAL
RESOURCES
George E. Meyer, Secretary
Charles R. Hammer,
Attorney at Law

101 South Webster Street
Box 7921
Madison, Wisconsin 53707
DIRECT LINE 608-266-0911
TELEFAX 608-267-3579
TDD 608-267-6897

February 11, 1994 IN REPLY REFER TO: 8300

Mr. Donald F. Kiesling
Attorney at Law
Michael Best & Friedrich
100 East Wisconsin Avenue
Milwaukee, WI 53202-4108

SUBJECT: WPDES Stormwater Discharge Permit,
Target Midwest Distribution Center
Oconomowoc, Wisconsin

Dear Mr. Kiesling:

I am writing in response to your letter to me of February 2, 1994 regarding the above-referenced matter. I believe your letter accurately reflects the understanding of the Department regarding the applicability to the Target Midwest Distribution Center of the Department's proposed storm water administrative rules, subject to the following qualifiers.

First, as you correctly state in your letter, the administrative rules to implement the storm water discharge permitting program are still under development. The

Department will ask the Natural Resources Board to authorize hearings on the draft rules at its February monthly meeting. Consequently, any judgment rendered by us on the content of the administrative rules is one made based on a provision that can conceivably change by virtue of public input. I should note, however, that we do intend to follow closely the federal listing of industry types that require regulation. Consequently it is unlikely that an industry presently *not* on the list requiring a permit would be added through the hearing process.

Second, there will be thousands of facilities which will ultimately be subject to the administrative rules and anticipated general permits. The Department has not and cannot make individual judgments regarding the appropriate SIC code for all such facilities. We must rely on the facility owners to properly identify which SIC codes apply to their facilities. Nevertheless, presuming that the Target Midwest Distribution Center is appropriately classified as Industry No. 5311, we would agree that it does not require a permit under our draft administrative code as presently written.

Sincerely,

/s/ Charles R. Hammer
Charles R. Hammer

cc: Michael Witt WW/2
John Greene-DOJ

Michael Best
& Friedrich
Attorneys at Law

[Letterhead Address Omitted in Printing]

September 14, 1994

Charles R. Hammer, Esq.
Bureau of Legal Services
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707

Re: WPDES Storm Water Discharge Permit
Target Midwest Distribution Center
Oconomowoc, Wisconsin

Dear Mr. Hammer:

On February 2, 1994, I submitted a letter to you providing information about the Target Midwest Distribution Center at Oconomowoc, Wisconsin and requesting the Department's written determination that that facility was not required to apply for or obtain a Wisconsin Pollutant Discharge Elimination System ("WPDES") permit for discharge of stormwater run-off from the facility once it became operational. In response to my request, I received a letter from you dated February 11, 1994, in which you agree with my conclusion that no WPDES permit would be required for the facility. However, in your letter you qualified your opinion with regard to the fact that the administrative rules to implement the stormwater discharge permitting program (Wis. Admin. Code Ch. NR 216) were still under development.

Since receiving your February 11, 1994 letter, the Chapter NR 216 administrative rules were approved by the Natural Resources Board at its June, 1994 meeting and were approved by the Wisconsin Legislature. As a consequence of these developments, I am writing again to request the Department's written determination that the Target Midwest Distribution Center is not required to apply for or obtain a WPDES permit for the discharge of stormwater run-off from its facility.

If you have any questions regarding the information provided, need additional information, or if you wish to discuss the Department's proposed determination, please contact me as soon as possible. Thank you for your assistance in this matter.

Very truly yours,

MICHAEL, BEST & FRIEDRICH

/s/ Donald F. Kiesling
Donald F. Kiesling

DFK/mam

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES

(LOGO)
WISCONSIN
DEPT. OF NATURAL
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George E. Meyer, Secretary
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Attorney at Law

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September 15, 1994 IN REPLY REFER TO: 8300

Mr. Donald F. Kiesling
Attorney at Law
Michael Best & Friedrich
100 East Wisconsin Avenue
Milwaukee, WI 53202-4108

SUBJECT: WPDES Stormwater Discharge Permit, Target Distribution Center

Dear Mr. Kiesling:

On September 14, 1994 you wrote to me regarding a matter we had discussed in writing in February, 1994. Your question in February was whether the Target Midwest Distribution Center located in Oconomowoc, Wisconsin, would need to have a stormwater discharge permit for its operation. This is a separate issue from whether there should have been either state or federal permit coverage for stormwater discharges associated with construction of the facility.

My response, copy attached, is self-explanatory. Since that time ch. NR 216, Wis. Adm. Code, the administrative rule regulating stormwater discharges referenced in my

February 11, 1994 letter, has received final approval from this agency's governing body, the Wisconsin Natural Resources Board. The rules have also cleared, without amendment, the legislative review process provided for in ch. 227, Wis. Stats. The rules will become effective upon publication on November 1, 1994. No changes will occur between now and November 1. The time between clearance of legislative review and the date of effectiveness is associated with printing and publication needs.

While the public participation process referenced in my letter of February 11, did result in changes to the content of ch. NR 216, SIC Code No. 5311 was not added as an industrial sector requiring stormwater permit coverage for facility operation. Consequently, subject to one qualification, if the Target Midwest Distribution Center is appropriately classified under that Code number, no stormwater discharge permit need be applied for nor obtained. The one qualification is that § NR 216.21(2)(b)11., Wis. Adm. Code, does provide that this Department may determine any facility not otherwise subject to stormwater regulation to be a significant contributor of pollutants, thus requiring coverage by a stormwater discharge permit. The Department has made no such determination regarding the Target Midwest Distribution Center.

Sincerely,

/s/ Charles R. Hammer
Charles R. Hammer

No. 94-304

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE VILLAGE OF OCONOMOWOC LAKE,

Petitioner,

v.

DAYTON HUDSON CORPORATION, et al.,

Respondents.

AFFIDAVIT OF MICHAEL BEGLIN

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

MICHAEL BEGLIN, being first duly sworn according to law, deposes and says:

1. I am employed by Target Stores, a Division of Dayton Hudson Corporation ("Target"), as the General Manager of the Target Midwest Regional Distribution Center at Oconomowoc, Wisconsin ("Distribution Center").

2. Construction of the Distribution Center was completed on April 6, 1994, when an occupancy permit was issued by the City of Oconomowoc. Landscaping has also been completed.

3. The formal "Grand Opening" of the Distribution Center occurred on July 14, 1994.

4. Approximately 370 people are presently employed at the Distribution Center. The first shipments into the facility began on June 6, 1994 and the first shipments out of the facility began on July 17, 1994.

/s/ Michael Beglin
Michael Beglin

Subscribed and sworn to before me
this 15th day of September, 1994.

_____

Notary Public, State of Wisconsin
My Commission is/expires: _____

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

VILLAGE OF OCONOMOWOC LAKE and TOWN OF SUMMIT,

Plaintiffs,

v.

Case No. 93-C-0797

DAYTON HUDSON CORPORATION, GEORGE E. MEYER, Secretary, and the WISCONSIN DEPARTMENT OF NATURAL RESOURCES, VALDUS V. ADAMKUS, Regional Administrator, CAROL BROWNER, Administrator, and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

AFFIDAVIT OF JAY HOCHMUTH

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

JAY HOCHMUTH, being first duly sworn on oath, deposes and says:

1. I am the Deputy Administrator of the Division for Environmental Quality of the Wisconsin Department of Natural Resources ("Division").

2. Among other things, I am a custodian of the records of the Division including the records of Bureau of Waste Water Management which is part of the Division.

3. Attached hereto and incorporated herein as Exhibit 1 are true and correct copies of the following records of the Division:

A. Memorandum of agreement between the State of Wisconsin Department of Natural Resources and United States Environmental Protection Agency, Region V dated December 17, 1973.

B. Letter to then Governor Patrick J. Lucey dated February 4, 1974, from then EPA Administrator Russell E. Train delegating federal authority to the State of Wisconsin to administer federal water pollution control programs in Wisconsin.

/s/ Jay Hochmuth
Jay Hochmuth

Subscribed and sworn to before
me this 17th day of September, 1994.

_____
Notary Public, State of Wisconsin.
My Commission is/expires: _____

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

VILLAGE OF OCONOMOWOC LAKE and TOWN OF SUMMIT,

Plaintiffs,

v.

Case No. 93-C-0797

DAYTON HUDSON CORPORATION, GEORGE E. MEYER, Secretary, and the WISCONSIN DEPARTMENT OF NATURAL RESOURCES, VALDUS V. ADAMKUS, Regional Administrator, CAROL BROWNER, Administrator, and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

AFFIDAVIT OF MICHELLE SCHUELLER

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

MICHELLE SCHUELLER, being first duly sworn according to law, deposes and says:

1. I am a waste water specialist with the Wisconsin Department of Natural Resources ("DNR"), Bureau of Wastewater Management.

2. The DNR Bureau of Wastewater Management administers the State of Wisconsin's construction stormwater discharge permit program.

3. In 1976, Wisconsin was delegated authority by the United States Environmental Protection Agency ("U.S. EPA") to administer and implement a point source discharge elimination system permit program.

4. In addition to receiving authority to administer a point source discharge elimination system permit program, Wisconsin has been delegated authority to issue "general" Wisconsin Pollution Discharge Elimination System ("WPDES") discharge permits.

5. A "general" permit is essentially a set of standards that applies to a broad class of dischargers where environmental protection can be achieved through a set of general provisions that apply to all dischargers. The state currently has 15 general permits that apply to about 800 industrial facilities. DNR is in the process of implementing a general permit program for stormwater discharges. *See* DNR briefing memo dated November, 1992, which is distributed to general permit applicants. (Attached as Exhibit A.) EPA has been kept advised of, and concurred in, the Wisconsin method of handling permit applications while the state implements its program.

6. Under the stormwater permit program, sources need only submit a "Notice of Intent" application ("NOI"). *See*, "Wisconsin's DNR Stormwater Program" sheet dated May 12, 1993. (Attached as Exhibit B.) Upon receiving an NOI, the DNR will determine whether the applicant's discharging activities qualify for coverage

under the general permit. If the Department determines that the discharger's activities qualify for coverage under a general permit, the DNR will send written confirmation acknowledging receipt of the NOI and a letter indicating that the discharger will qualify for inclusion and regulation under a general permit.

To date DNR has sent out notifications to approximately 20,000 existing sources indicating they must submit NOI's to DNR. To date DNR has received over 4,000 NOI's for existing and new sources and have notified them that their application has been received.

7. Upon request by the applicant, the DNR will send a letter confirming receipt of the NOI application. This letter states that in the view of the Department, submittal of the NOI application satisfies the minimum requirements of the Clean Water Act at this time.

8. On April 9, 1993, the DNR received from Target Corporation a "Notice of Intent for Stormwater Discharge Associated with Construction Activities under a WPDES General Permit." A true and correct copy of the April 9, 1993, NOI received from Target Corporation is attached hereto as Exhibit C.

9. Along with an NOI, Target Corporation submitted to DNR a "Stormwater Management Report for Witcher Construction Company" describing the stormwater management techniques to be utilized at the Target Distribution Center. A true and correct copy of that report is attached as Exhibit D.

10. On April 22, 1993, the DNR issued a letter to Witcher Construction Company, a construction contractor

hired by Target Corporation to construct the Target Distribution Center. A true and correct copy of the April 22, 1993, letter is attached hereto as Exhibit E.

11. With its submittals, Target has done all that is required by DNR to apply for a construction stormwater permit.

12. To the best of my knowledge, with regard to the operational WPDES permit that will be required of the Target Distribution Center once the facility has been constructed, application for a permit need only be received 180 days prior to the facility's initial discharge. A permit application before such time is not required under Wisconsin law.

/s/ Michelle Schueller
Michelle Schueller

Subscribed and sworn to before
me this ___ day of September, 1994.

_____
Notary Public, State of Wisconsin.
My Commission is/expires: _____